STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

JEFFREY L. FRAZZINI,

Plaintiff-Appellee,

and

AAA OF MICHIGAN,

Intervening Plaintiff-Appellee,

v.

TOTAL PETROLEUM INCORPORATED
Self-Insured,

Defendant-Appellant.

/

Supreme Court No. 119362

Court of Appeals No. 223694

WCAC No. 98-0260

BRIEF ON APPEAL ON BEHALF OF INTERVENING PLAINTIFF-APPELLEE, AAA OF MICHIGAN

PROOF OF SERVICE

* * * ORAL ARGUMENT REQUESTED * * *

GARAN LUCOW MILLER, P.C.
Daniel S. Saylor (P37942)
Attorneys for Intervening Plaintiff-Appellee,
AAA OF MICHIGAN
1000 Woodbridge Place
Detroit, Michigan 48207-3192
(313) 446-5520

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JURISDICTION

The appellate courts have jurisdiction to review final orders of the Workers' Compensation Appellate Commission under MCL 418.861a(14), which vests jurisdiction with the Court of Appeals upon the filing of an application within 30 days of the WCAC order, as occurred in this case. From the Court of Appeals' opinion issued May 11, 2001, Defendant timely filed its application for leave to appeal to this Court, under MCR 7.302. On June 1, 2001, by order of January 23, 2002, the Court granted the application for leave to appeal. Accordingly, the Court has jurisdiction.

COUNTER-STATEMENT OF QUESTION PRESENTED

I. WHERE PLAINTIFF'S INJURIES INDISPUTABLY AROSE OUT OF HIS USE OF A MOTOR VEHICLE FOR HIS EMPLOYER, SHOULD THEY ALSO BE DEEMED TO HAVE ARISEN OUT OF HIS EMPLOYMENT SINCE, WHILE THE ACCIDENT WAS TRIGGERED BY A PERSONAL CONDITION (DIABETES), THE EMPLOYMENT PUT PLAINTIFF IN A POSITION (DRIVING A CAR) IN WHICH HIS RISK OF INJURY AND THE SEVERITY OF INJURY WERE SUBSTANTIALLY INCREASED?

The **Hearing Magistrate** answered, "Yes."

The **Workers' Compensation Appellate Commission** answered, "No."

The **Court of Appeals** answered, "Yes."

Plaintiff-Appellee FRAZZINI would answer, "Yes."

Intervening Plaintiff-Appellee AAA answers, "Yes."

Defendant-Appellant TOTAL would answer, "No."

II. IS THE COURT OF APPEALS' DECISION CONSISTENT WITH *VAN GORDER v PACKARD MOTORCAR COMPANY*, 195 MICH 588 (1917)?

The **lower courts** did not address this question.

Intervening Plaintiff-Appellee AAA answers, "Yes," the Court of Appeals' decision is consistent with the result reached in *Van Gorder* (ultimately a "level floor" case - *see*, *Ledbetter v Michigan Carton Co*, 74 Mich App 330, 337 (1977)), but not with certain dicta contained within the *Van Gorder* opinion, which this Court should reject.

Defendant-Appellant TOTAL would answer, "No."

COUNTER-STATEMENT OF FACTS

The legal issue raised in this appeal is presented to this Court on facts that are not in dispute. Plaintiff-Appellee, JEFFREY L. FRAZZINI, was employed by Defendant-Appellant, TOTAL PETROLEUM, INC., in its retail outlet in Howell, Michigan. His many job duties as manager of the store included regular trips to the bank to make cash deposits, and other errands such as trips to nearby stores to purchase incidental materials needed in the course of business (163a, 171a-172a).

FRAZZINI also is an insulin-dependent diabetic, a condition he controls with regular injections of insulin and by eating regularly. Plaintiff's disease puts him at risk of suffering attacks of hypoglycemia, which can cause aberrant and irrational behavior and even unconsciousness (54a, 56a-58a; 169a; 384a, 387a).

On May 19, 1994, Plaintiff was seriously injured in a motor vehicle accident in the course of his employment with TOTAL (386a). He had just made a deposit at the bank and was driving to a nearby Wal-Mart store to purchase materials for making employee name tags (171a-172a) when he had an insulin reaction. Two miles past the Wal-Mart store he was involved in the accident that caused his disabling injuries and led to this action (55a-56a; 173a-175a, 177a).

Intervening Plaintiff, AAA OF MICHIGAN, is the provider of no-fault automobile insurance coverage to FRAZZINI. Having paid benefits and expenses for Plaintiff's "accidental bodily injury arising out of the ... operation ... or use of a motor vehicle as a motor vehicle" (MCL 500.3105(1)), arising out of the motor vehicle accident, AAA OF MICHIGAN intervened in the workers' compensation proceedings by stipulation of the

parties (118a). Intervening Plaintiff is seeking recoupment on the basis that applicable workers' compensation benefits are first in priority over no-fault insurance benefits. MCL 500.3109(1); *Russell v Welcor, Inc*, 157 Mich App 351; 403 NW2d 133 (1987), *lv den*, 429 Mich 860 (1987).

There is no dispute that Plaintiff's injuries were sustained in the course of his employment, as Magistrate Crary E. Grattan made a supported finding of fact that FRAZZINI was on company business at the time of his automobile accident (386a-387a). Further, Magistrate Grattan held that the injuries arose out of his employment. He rejected Defendant's reliance on the "idiopathic fall" cases, in which benefits are denied on the basis that the worker's injuries result solely from a "personal risk," without any contribution from the employment.[1] Magistrate Grattan recognized that the result is different when an employment-related risk (in this case, operating a motor vehicle) also contributes:

> The general rule in [the "idiopathic fall"] line of cases is that if the employment did not cause the fall, or increase the danger encountered in falling, the resulting injury is not compensable. However, this line of cases also holds that if the work increased the danger involved in falling, the injury is compensable. Although the instant case does not involve a fall, the principle is the same. The question is: Does driving a vehicle increase the danger to the driver if the driver is suddenly incapacitate[d] by a non-work related condition such as an insulin reaction? The answer to this question is obviously yes. I therefore find that

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[1] Intervening Plaintiff will not dispute, in this case, that an injury must arise out of the employment as well as arise in the course of employment to be compensable under MCL 418.301(1). But *see*, *Simpkins v General Motors Corp*, 453 Mich 703, 712, n. 14; 556 NW2d 839 (1996). When one's employment requires the operation of a motor vehicle, however, and an accident occurs in which a personal injury is sustained in the course of that employment (i.e., the injury arose out of the employer-mandated use of the motor vehicle), the injury does "aris[e] out of ... the employment." In other words, it cannot be said that the injury resulted without any causal contribution from the employment.

> plaintiff's injury did arise out of and in the course of his employment.

(Magistrate's opinion, p. 12 -- Appendix, 388a).

The resulting award of benefits was reversed on Defendant TOTAL's appeal to the Workers' Compensation Appellate Commission. In an opinion issued October 26, 1999, the WCAC held the magistrate to have committed legal error in his application of the idiopathic fall rule in *Ledbetter v Michigan Carton Co*, 74 Mich App 330; 253 NW2d 753 (1977) (WCAC opinion, p. 4 -- Appendix, 395a), accepting Defendant's position that "no nexus exists between plaintiff's injuries and his employment at defendant because plaintiff was injured from his own personal disease, from a personal risk associated with diabetes" (*id.*). The WCAC followed its recently issued decision in *Auto Club of Michigan v Faircloth Mfg Co*, 1999 ACO #389, concluding:

> We find the magistrate legally erred in finding that the mere act of driving a vehicle in the course of employment increased the risk of injury.

(396a).

On applications filed with the Court of Appeals, leave was granted in both *Hill/Auto Club of Michigan v Faircloth Mfg Co* and *Frazzini/AAA of Michigan v Total Petroleum, Inc*, and the cases ultimately were consolidated (399a-400a).

In a published opinion dated May 11, 2001, *Hill v Faircloth Mfg Co* and *Frazzini v Total Petroleum*, 245 Mich App 710 (2001) (401a), the Court of Appeals expressly rejected the WCAC's reasoning that "benefits are available only if employment poses risks to the employee greater than the common risks of everyday life." 245 Mich App at 713 (slip op.,

at 3 -- Appendix, 403a). The Court applied the prevailing rule for "idiopathic fall" or "personal risk" situations, concluding as follows:

> The cases before us are analogous to those in which an employee suffers greater injuries because the collapse occurs while standing on a ladder or near a piece of machinery. Driving a vehicle for their employers increased the level of risk involved in Hill and Frazzini's diabetic seizures and loss of consciousness. Further, both sustained injuries more severe than those they would suffer had they simply blacked out while standing on a level floor at work. In sum, their disabling or aggravated injuries were directly related to the vehicular accidents rather than to diabetes, even though the diabetes caused the accidents to occur.

245 Mich App at 719 (slip op., at 7 -- Appendix, 407a).

TOTAL (along with FAIRCLOTH) applied to this Court to challenge the Court of Appeals' holding. The applications were granted by Order of January 23 2002 (409a). Intervening Plaintiff, AAA OF MICHIGAN, now submits this brief in support of its contention that the injuries plaintiffs sustained in the automobile accidents are covered under the workers' disability compensation act.

COUNTER-STATEMENT OF THE STANDARD OF REVIEW

Presented as Argument II of its Brief on Appeal, Defendant-Appellant TOTAL contends that the appellate courts are limited to a very narrow, deferential standard of review in this appeal from the Workers' Compensation Appellate Commission. Because of its failure to acknowledge the very material distinction between findings of fact and conclusions of law, however, Defendant is mistaken. The standard of review is *de novo*. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 401; 605 NW2d 300 (2000).

Asserting that "extraordinary deference is owed to the WCAC in this highly technical area of law," (TOTAL's Brief on Appeal, p. 13), Defendant accuses the Court of Appeals of having erred in "demonstrat[ing] a lack of deference to the WCAC's administrative expertise" (*id.*, p. 11), in failing to "display even a moderate deference, let alone extreme (*id.*, p. 13). Defendant ultimately asserts that "[t]he question before the Court of Appeals really was whether the WCAC exceeded its authority," and that the Court "should have at least explained how the WCAC exceeded its authority" (*id.*, pp. 13, 15).

In fact, the Court of Appeals properly identified the applicable standard of appellate review of the WCAC's legal conclusions as *de novo*. 245 Mich App at 716-717, n. 5 (slip op., at 5 -- Appendix, 405a). The Court's discussion correctly notes that judicial review of a WCAC decision includes "'whether the WCAC exceeded its authority or committed an error of law.'" *Id.*, *quoting*, *Chrysler Corp v Silicosis Fund*, 243 Mich App 201, 203; 622 NW2d 795 (2000) (emphasis added). Defendant thus is incorrect in its assertions that the scope of review is limited to "whether the WCAC exceeded its authority."

The quotations of the statute and case law Defendant provides regarding the narrow scope of judicial review expressly concern *factual* findings (TOTAL's Brief on Appeal, pp. 12-13, *quoting*, *Holden v Ford Motor Co*, 439 Mich 257, 268-269; 484 NW2d 227 (1992), and *citing*, *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 704; 614 NW2d 607 (2000)). The appellate courts are empowered to review *de novo* any issue of law raised in a final order of the WCAC. MCL 418.861a(14).

To be sure, while *Mudel* made clear that the courts must defer to the WCAC's findings of fact as long as there is evidence to support them and the WCAC did not

misapprehend its administrative appellate role, questions of law involved in a final order of the WCAC are reviewed under a de novo standard of review. *Mudel*, 462 Mich at 732 ("Appendix"), *citing, DiBenedetto v West Shore Hospital, supra.* "[A] decision of the WCAC is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework." *DiBenedetto*, 461 Mich at 401-402. This is precisely the standard employed by the Court of Appeals below, and should likewise be the standard observed by this Court.

There has been no disagreement among the parties and the tribunals in this case as to the facts. Rather, what was presented to the Court of Appeals was a legal question: whether the "idiopathic fall doctrine" applies to the established facts so as to remove Mr. Frazzini's injury from coverage under Michigan's workers' compensation scheme. For the reasons well-stated in the Court of Appeals' opinion itself, together with those that follow, Intervening Plaintiff, AAA OF MICHIGAN, submits that the answer is "no." As the Court of Appeals held, it was the hearing magistrate, not the WCAC, that properly applied the law to the facts of this case. This Court should affirm and endorse the opinion of the Court of Appeals.

ARGUMENT

PLAINTIFF'S INJURIES, WHICH INDISPUTABLY AROSE OUT OF HIS USE OF A MOTOR VEHICLE *FOR HIS EMPLOYER*, SHOULD BE DEEMED TO HAVE ARISEN OUT OF HIS EMPLOYMENT SINCE, WHILE THE ACCIDENT WAS TRIGGERED BY A PERSONAL CONDITION (DIABETES), THE EMPLOYMENT PUT PLAINTIFF IN A POSITION (DRIVING A CAR) IN WHICH HIS RISK OF INJURY AND THE SEVERITY OF INJURY WERE SUBSTANTIALLY INCREASED.

Plaintiff FRAZZINI suffered disabling traumatic injuries in an automobile accident while in the course of performing errands for the benefit of his employer (driving to the bank and to a Wal-Mart store for work supplies). The cause of the accident itself was a hypoglycemic episode stemming from Plaintiff's diabetes. The magistrate found as fact that "the plaintiff was on the job performing the work expected of him as a station manager at the time of the accident and that he was planning on returning to his work station" (387a), thus "plaintiff was in the direct course of his employment" (*id.*).

The question becomes whether the accident-related injuries, which undeniably were the product of the *combined* risks of Plaintiff's diabetic condition *and* the employer-given task of operating a motor vehicle, are compensable under the act. AAA OF MICHIGAN submits that they are.

As a recurring theme in its Brief on Appeal, Defendant TOTAL urges at least four times that "the employment did not cause or contribute in any way to the Plaintiff's disease of diabetes, nor did it cause or contribute in any way to his hypoglycemic reaction to his disease" (TOTAL's Brief on Appeal, pp. 1, 2, 7, and 18). The statement, of course, is true; TOTAL caused neither Plaintiff's diabetes nor the hypoglycemic reaction. The employment

did, however, place Plaintiff behind the wheel of a motor vehicle traveling 35-45 miles per hour, and thus dramatically increased the likelihood that any hypoglycemic reaction would result in serious traumatic injuries. Defendant staunchly refuses to address or even acknowledge this critical point.

The WCAC, likewise, erred in missing the legal significance of this point. In its decision to deny benefits in both *Frazzini* and *Hill/Auto Club*, the WCAC actually began by citing the appropriate legal standard:

> "Employees that suffer injury due to an event initially triggered by a personal, non-work-related condition must demonstrate that their conduct of employment affairs put them in a position where the risk of injury increased."

(WCAC opinion in *Frazzini*–395a) (*quoting, Auto Club of Michigan and Hill v Faircloth Mfg Co*, 1999 ACO #389). This much of the WCAC's statement of the standard was accurately based on *Ledbetter v Michigan Carton Co*, 74 Mich App 330; 253 NW2d 753 (1977).

The WCAC, however, then legally misapplied the standard to the undisputed facts, concocting a new and unprecedented "common risk of everyday life" element as an additional standard to be satisfied for an injury to be deemed to have arisen out of employment. The Court of Appeals exposed and corrected the WCAC's legal error, and reaffirmed that the analysis in *Ledbetter v Michigan Carton Co, supra*, is correct. As will be shown, the **result** in *Van Gorder v Packard Motorcar Company*, 195 Mich 588; 162 NW 107 (1917), is not inconsistent with the cases at bar, although this Court should reject the dicta contained in the *Van Gorder* opinion and instead confirm the analyses set forth in the Court of Appeals' opinions in *Ledbetter* these cases.

A. Plaintiff's injuries arose not only out of his personal diabetes-related risk but directly out of his employer-given task of operating a motor vehicle, as well, because it produced injuries that would not have resulted, or that were more severe than would have resulted, absent the employment contribution.

The test for determining whether a plaintiff who suffers injuries from a preexisting personal condition is entitled to workers' compensation benefits was accurately articulated in *Ledbetter v Michigan Carton Co*, 74 Mich App at 335: "'The legal principle to be applied is ... whether "the employment aggravated, accelerated, or combined with the disease or infirmity to produce the * * * disability".'" *Id.*, *quoting*, *Deziel v Difco Laboratories, Inc*, 394 Mich 466, 475-476; 232 NW2d 146 (1975) (emphasis added).[2] The *Ledbetter* court

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[2] Note that in this opinion, the *first* of the two *Deziel* decisions, the Court endorsed the widely followed test from Larson's Worker's Compensation Law that requires an actual causal contribution from the employment before an injury could be deemed to have arisen out of the employment:

> The Workman's Compensation Act, MCLA 418.301; MSA 17.237(301), requires that injuries to be compensable must arise "out of and in the course of" employment. In cases such as these which are asserted to involve pre-existing conditions the question of whether a disability arose out of the employment is resolved by the fact finder only upon inquiry regarding the work connection. The legal principle to be applied is that set forth by Professor Larson in §12.20 of his treatise [as quoted above]. ... To apply that principle the decision maker must resolve three questions of fact and law:
>
> 1) Is the claimant disabled?
>
> 2) If so, is the claimant disabled on account of some "personal injury"?
>
> 3) Did the claimant's employment aggravate, accelerate or combine with some internal weakness or disease to produce the personal injury?
>
> If those questions are answered in the affirmative and supported by the record, the decision maker must then find as a matter of law that the claimant had a personal injury, which arose out of the employment, and that compensation must be awarded.
>
> *Deziel*, 394 Mich at 475-476 (emphasis added).

noted that, while *Deziel* involved psychiatric problems, "the test announced is equally applicable to all cases where the injury results from some pre-existing personal condition." *Ledbetter*, at 335.

There is no dispute in this case (*Frazzini*) that Plaintiff's injuries arose *in the course of* his employment; what Defendants dispute is whether they *arose out of* the employment. But since it was established that the traumatic injuries Plaintiff received as a result of his insulin reaction would not have occurred at all, or certainly would not have been as severe, if he had not been operating a motor vehicle at the time -- as his employment required (*see*, Magistrate's opinion, 387a-388a), it is not logical to deny that the injuries arose out of the employment.

This comports with the early articulations of the causation element cited by Amicus Curiae Michigan Self-Insurer's Association:

> "It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed, and the resulting injury."

Appleford v Kimmel, 297 Mich 8, 12-13; 296 NW 861 (1941), *quoting*, *Pierce v Michigan Home & Training School*, 231 Mich 536, 537-538; 204 NW 699 (1925). Here, the requisite causal connection exists between Plaintiff's operation of a motor vehicle (the conditions under which his work was required to be performed) and his traumatic injuries.

In these "idiopathic fall" cases, then, the inquiry is whether a specific incident of the plaintiff's employment "combined with the disease or infirmity" [plaintiff's personal risk]

to produce the disability. Defendants' position clearly lacks merit in dismissing or ignoring the obvious employment contribution to the injuries sustained by FRAZZINI and HILL.

In this regard, the Defendant grossly misreads the opinion of the Court of Appeals in this case, asserting that the Court "rejected the *Ledbetter* analysis." (TOTAL's Brief on Appeal, p. 16). This is clearly inaccurate, in that the Court of Appeals actually followed and applied the *Ledbetter* analysis in all respects. What the Court of Appeals rejected was the flawed reasoning of the WCAC in regards to its application of *Ledbetter*.

In *Ledbetter*, the employee was on his employer's premises when suddenly he "began shaking and foaming at the mouth, turned completely stiff, and fell to the floor." His fall to the "level floor" resulted in a skull fracture. 74 Mich App at 332-333. Adopting the prevailing rule for such so-called "idiopathic fall" situations, the Court upheld the denial of benefits, articulating the test as turning on the extent of any employment contribution to the resulting injuries:

> We do not believe the sole fact that the decedent's fall occurred on the employer's premises justifies an award of dependency benefits to his widow.
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> * * *
>
> In personal risk cases, including idiopathic fall situations, the sole fact that the injury occurred on the employer's premises does not supply enough of a connection between the employment and the injury. Unless some showing can be made that the location of the fall aggravated or increased the injury, compensation benefits should be denied.

Ledbetter, 74 Mich App at 336-338 (as quoted in *McClain v Chrysler Corp*, 138 Mich App 723, 731; 360 NW2d 284 (1984) (emphasis added).

Under *Ledbetter*, and now under *Hill/Frazzini* as well, compensation benefits still are not owed when an injury is sustained solely as a result of a "personal risk," but they are where there is an employment contribution. "'It is reasonable to require a showing of at least some substantial employment contribution to the harm.'" *Ledbetter*, at 336 (quoting, Larson, Worker's Compensation Law).

The plaintiff in *Ledbetter* attempted to meet this requirement by contending that the floor onto which decedent fell was so hard as to increase the extent of the injury beyond what would otherwise have resulted. This was somewhat of a stretch, it must be recognized, and the Court of Appeals rejected it: "Although we recognize that a fall onto a softer surface may have lessened the impact, we are not convinced that the composition of the floor necessarily aggravated the harm. It cannot be said with certainty that had the fall occurred at a different location, away from the employer's premises, the injuries would have been less serious." 74 Mich App at 337. Importantly, however, the Court clarified that a different result is required when, in fact, the work-circumstances of the 'fall' do significantly impact the severity of the injury: "This uncertainty distinguishes a level floor case from cases where compensation has been allowed for idiopathic falls from platforms, ladders, or onto some type of moving machinery." *Id.* (emphasis added).

Benefits were thus denied the plaintiff in *Ledbetter* and the plaintiffs in the *McClain* cases, as each involved nothing more than a fall to the floor, with no greater employment contribution to the situation beyond the fact that the fall occurred on the employer's premises; which is to say, in terms of an employment-related risk, there was no contribution at all. As *Ledbetter* seemingly made clear, the result is different when the employee's

"idiopathic fall" occurs not merely on the employer's premises but while on the employer's extension ladder; not merely on the employer's premises, but while working over moving gears of the employer's machinery; not merely on the employer's premises, but while operating heavy machinery for the employer -- such as a motor vehicle. The WCAC missed this point, and the Court of Appeals properly corrected the error by accurately identifying the limits of the "idiopathic fall" or "personal risk" principle.

A discussion in the Amicus Curiae Michigan Self-Insurers Association's brief provides a clear illustration of the employment-contribution requirement, and why it is met in the case at bar. Describing the 'arising out of' inquiry ("*how* an injury occurs") as being **whether the employment was a "mechanism of injury,"** Amicus Curiae first posits that "[e]mployment is the mechanism of injury when equipment such as a press or tool injures; when an object such as a bag of cement or a box of widgets proves too heavy to handle. . ." (Amicus Curiae Brief, p. 11). Amicus Curiae then proceeds to explain the "in the course of" inquiry ("*when* an injury occurs"):

> *In the course of* employment deals with when the worker is performing service contemplated by the contract of employment. An injury occurs *in the course of* employment when an employee is performing service which is contemplated by the contract of employment . . . such as operating a press or driving a truck[.]

(Amicus Curiae Brief, pp. 11-12) (emphasis added).

Then, using two press operators as an example, Amicus Curiae describes an "idiopathic fall" situation (a la *Ledbetter*) and a typical press injury to show how an injury can be one that arises *in the course* of employment but not *out of* the employment. What

Amicus Curiae fails to recognize, however, but would have recognized if only it had plugged in facts analogous to the case at bar, is that FRAZZINI's injury clearly *passes* the "arising out of" test:

> One example involves two employees who are injured while operating a press. The first employee is hurt because a widget escapes from a clamp during production. The other employee has an epileptic seizure and is injured upon hitting the floor. For each of these two workers employment is *when* the injury occurred because both were performing service which was contemplated by the contract of employment by actually doing the task assigned. However, for the first employee, employment is also how the injury occurred because of the flying widget. For the other, employment is not how injury occurred because only the intrinsic condition of epilepsy was the mechanism for how that injury occurred.

(Amicus Curiae Brief, p. 12).

FRAZZINI is represented by neither of the two press operators in Amicus Curiae's example. So consider a third worker who, while preparing to cycle the press, stiffens into a seizure and falls forward into the press, suffering a crush injury to his hand. Although the worker's personal risk of epilepsy was an initiating cause of the accident, Amicus Curiae's "mechanism of injury" test clearly reveals that the employment materially contributed to the injury such that it *arose out of* employment. The motor vehicle FRAZZINI was operating in the course of employment, no different than the press in this example, was itself the

employment contribution ("the mechanism of injury"). FRAZZINI's injuries, therefore, arose out of his employment.[3]

The difference between Plaintiff FRAZZINI suffering an insulin-related blackout while standing on a level floor at the shop as compared to him suffering it while operating a motor vehicle at 35-40 miles per hour is obviously dramatic in terms of whether any injury would occur and, if so, how great the injuries might be; and the only reason FRAZZINI was operating a motor vehicle instead of standing on a level floor at the shop was that his employment duties required him to be operating a motor vehicle. FRAZZINI clearly demonstrated a "substantial employment contribution" with respect to the injuries he suffered as a result of his "personal" or "idiopathic" blackout.

B. The Court of Appeals' decision is consistent with the result reached in *Van Gorder* (ultimately a "level floor" case), but not with dicta contained within the *Van Gorder* opinion, which this Court should reject.

The Supreme Court opinion in *Van Gorder v Packard Motorcar Company*, 195 Mich 588; 162 NW 107 (1917), contains a review of English case law together with a concluding commentary that would lend support Defendant-Appellant's argument. The holding of the case stands only for the basic proposition, however, that an injury arising in the course of

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[3] Similarly supportive of this conclusion is Amicus Curiae's discussion of *Thiede v G D Searle & Co*, 278 Mich 108; 270 NW 234 (1936). There the worker was required by his employment to stay overnight in a hotel. The worker sustained fatal injuries when the hotel caught on fire. Benefits were held to be owed, since, as described by Amicus Curiae, the hotel "was an instrument of employment" and ultimately became the "mechanism," or "how," the employee was injured. (Amicus Curiae Brief, pp. 45-46). The fire itself, of course, had nothing whatsoever to do with the employment, just as Plaintiff FRAZZINI's diabetic condition was not work-related. Both, however, became triggering events that combined with the "instrument of employment" (the hotel; the car) to produce injury.

employment but having no causal contribution whatsoever from the employment, apart from being the mere situs of the injury, does not "arise out of" the employment. As indicated, Intervening Plaintiff will not dispute this proposition.

In terms of its facts and holding, *Van Gorder* is essentially identical to *Ledbetter*, *supra.* Both involved workers who, while in the ordinary course of employment, suffered epileptic seizures and as a result fell onto the floor, striking their heads on the floor and suffering fractured skulls that proved fatal. *Van Gorder*, 195 Mich at 589-590; *Ledbetter*, 74 Mich App at 332. Admittedly, the worker in *Ledbetter* had been standing on the floor itself, while the worker in *Van Gorder* was on a 6-foot scaffold; but in terms of causation -- "the controlling question in the case" -- this distinction was established as *a matter of fact* to be a distinction without a difference: "There was undisputed testimony that a fracture of the skull might be and frequently is produced by one falling while walking on the street." 195 Mich at 590. According to the Court, then, the plaintiff in *Van Gorder* could just as well have been on a level floor, like the plaintiff in *Ledbetter*, for all the difference it would have had on the ultimate injury.

The Court pointed out that the scaffold was not improperly constructed or otherwise unsuitable for use. Nothing about the work itself precipitated the fall. The only *potential* work-related contribution to Van Gorder's injury, then, was the fact that he was situated up on a scaffold rather than on the floor, but this was factually established not to be causally significant. And this fact itself was enough to dispose of the case, since it answered "the controlling question":

> We therefore pass to the controlling question in the case, viz.: Did the injury arise out of the employment? Was it an incident of the employment, due to it, or proceeding from it? Was there a causal connection between the injury and the employment?

Van Gorder, 195 Mich at 591 (emphasis added).

Having already observed that the "undisputed testimony" dictated a negative answer to this question, the Court thereafter downplayed the 6-foot elevation of the scaffold as being insignificant:

> In the instant case the deceased was performing the ordinary services of his trade, that of a plumber and steam fitter. He was standing on a scaffold a few feet from the floor. ... We do not think it would be seriously contended that had he fallen in an epileptic fit while standing on the floor and received the injury he did that the injury arose out of the employment, and that the defendant was liable.[4] [Citation omitted.] The height from which he fell, here only a short distance, could not change the liability for the injury.

Van Gorder, 195 Mich at 597 (emphasis added). Once it had been established that the worker's elevation "a few feet from the floor," in terms of causing the injury, was no different *from a factual standpoint* than if he had been on the level floor, there was no need for the Court to consider hypothetically whether a more substantial height, having an actual effect on the nature of the injuries, would be *legally* material.

But the Court proceeded to do so, opining that a difference in the resulting injury would not have changed the legal result:

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[4] This, of course, is precisely what was presented in *Ledbetter*, *supra*. The fact that the *Van Gorder* opinion so strains to minimize the height of the scaffold and equate its facts to that of a level floor case supports the contention that the two cases are essentially identical, and should both be regarded as "level floor" cases.

> A person falling a greater distance may be more seriously injured than one falling a lesser distance; but it does not change the question of responsibility, of liability. The distance of the fall might contribute to the extent of the injury, but it was not a contributory cause to the fall.

Van Gorder, 194 Mich at 597-598 (concluding by pointing out again that, here, the plaintiff was only "a few feet from the floor"). This passage essentially amounts to an advisory opinion about a hypothetical person "falling a greater distance" and being "more seriously injured." It, therefore, is dicta.

The case at bar involves no ladders or scaffolds at all, regardless of height. It involves a worker who was operating a fast-moving motor vehicle for his employer. Whatever close factual questions there might be in cases involving falls from varying heights, then, there simply is no question here of the existence of a manifest causal relationship between FRAZZINI's traumatic injuries and the employment contribution (operating a motor vehicle). To endorse the Court of Appeals' opinion in the case at bar, therefore, the Court need not overrule *Van Gorder*, but merely decline to follow its dicta.

The Court should indeed reject the dicta in *Van Gorder*, the passage quoted above, because it erroneously examines the causal relationship between the workplace and *the accident* rather than between the workplace and the *injury*. This analytical error is brightly revealed in Defendant-Appellant TOTAL's discussion of *Van Gorder* (TOTAL's Brief on Appeal, pp. 6-9).

As the Court will observe, TOTAL begins by accurately quoting the statute, which mandates provision of benefits to an employee "who receives a **personal injury** arising out of and in the course of employment". MCL 418.301(1). According to TOTAL, this statute

"means that *the actual cause of* the personal injury must have some nexus to the work place" (TOTAL's Brief on Appeal, pp. 6-7). In this manner, TOTAL (along with the concluding dicta in *Van Gorder*, 195 Mich at 598) would subtly shift the focus away from the injury-employment nexus and instead look more narrowly at the cause of "the accident." TOTAL thus proceeds to assert repeatedly that "the direct and immediate cause *of the automobile accident* which lead to plaintiff's injuries had nothing to do with his employment"... "[t]he immediate cause *of this accident* derived from a personal medical condition"... (TOTAL's Brief on Appeal, p. 7).

The statute, however, says nothing about a relationship between "the cause" of the injury and the workplace; it says nothing about a relationship between "the accident" and the workplace. Intervening Plaintiff submits, rather, that the statute speaks of a causal nexus between *the injury* and the workplace. Relying on *Van Gorder*, TOTAL points out that the scaffolding from which the worker fell "did not cause *the accident*. Instead the immediate causation *of the accident* was the epileptic fit." (TOTAL's Brief on Appeal, p. 8) (emphasis added). While these statements are true, observe what happens when the inquiry is properly shifted to the causation of the *injury* rather than the cause of the accident.

In *Van Gorder* the injury was truly a product of an epileptic fit and gravity, since gravity, and not merely the epileptic fit, caused the fall. Just how much "gravity" is attributable to the employer will depend upon how high the employment required the worker to climb. Where the height from which the plaintiff fell proves to be causally insignificant (in *Van Gorder* only "a few feet from the floor," and found not to be material in the causation of the injury) there is no employment contribution to the injury. It is different

where a greater height is shown to be causally material to the injury. Since to this extent the result *is* attributable to the employment, the injury must be deemed to have arisen "out of" as well as "in the course of" employment.

Thus in *Van Gorder*, an epileptic seizure caused the employee's accident; the employment contribution, if any, was placing the employee on the scaffold a few feet from the floor. This employment contribution ended up not being causally significant. The employment, therefore, did not cause the accident, but it also did not cause the injury.

The same cannot be said of the case at bar, as TOTAL acknowledges as it concludes its "cause of the accident" analysis:

> The fact that [FRAZZINI] was in a moving vehicle may have contributed to the extent of his injuries, but the moving vehicle did not cause the accident. His *accident* did not arise out of the employment, but instead arose out of a personal disease which had no relationship to the work place.

(TOTAL's Brief on Appeal, p. 9) (emphasis added). TOTAL's conclusion, while consistent with the dicta in *Van Gorder*, is manifestly *inconsistent* with the terms of the statute, which *speak of the ultimate injury arising out of the employment, not the accident.*

The Court, therefore, should reject the *Van Gorder* analysis, as it erroneously focuses on the cause of the worker's "accident" rather than on whether the employment caused or contributed to the "injury." Since the opinion had already concluded that the employment (the height of the scaffold) did not contribute to the injury, its "accident" analysis is dicta. The Court of Appeals' analysis and holding is soundly based on the statute and applicable case law. This Court should uphold and endorse the Court of Appeals' opinion.

C. The "common risks of everyday life" test, articulated by the WCAC and urged by TOTAL, was properly rejected by the Court of Appeals and should be by this Court.

FRAZZINI's injuries arose out of his employment because what he was doing for his employer -- traveling in a piece of machinery at 35-40 miles per hour -- was a causative factor in bringing about the traumatic injuries he sustained. Absent this employment contribution, he would have suffered no traumatic injuries at all, or certainly not of the same quality and degree. The employee in *Ledbetter* was in a materially different situation, since his employment provided nothing more than the situs (the floor on which he was standing); it provided no employment-related risk.

In order to disregard the significance of the distinction between the level floor in *Ledbetter* and the moving motor vehicle in the cases at bar, the WCAC articulated an inappropriate, additional requirement:

> "In order for an injury to be compensable, the risk posed by the employment situation must go beyond the common risks of everyday life."

(396a) (*quoting, Auto Club/Hill, supra*). The WCAC provided no legal citations for this proposition, and it was this flawed reasoning that was properly rejected by the Court of Appeals. Nor does logic support the use of a "common risks of everyday life test." Washing dishes, for example, and whatever risk washing dishes entails, is common to every day life; yet an employee-dishwasher who cuts himself on a knife or on broken glass will not be denied benefits just because the risks are common to everyday life.

The risks incident to driving a motor vehicle are likewise real, even if common to everyday life. The WCAC's reasoning suggests that it would have decided the case differently if FRAZZINI had been operating a piece of heavy machinery less common than an automobile, but was equally injured as a result of suffering an insulin reaction in the process, yet there is no basis for a meaningful distinction.

There are many risks in the conduct of everyday life; and often the acts that pose these risks are done for remuneration in the course of employment. When the risk results in an injury, the mere fact that this employment risk is one that is also commonly assumed in everyday life does not bar entitlement to compensation.

TOTAL argues that examples such as a dishwasher or butcher cutting his or her hand on a knife are inapt comparisons if the accident resulted from a blackout or confusion caused by a personal illness (TOTAL's Brief on Appeal, pp. 17-18). This argument is specious. When an employee drives a motor vehicle in the course of employment and is injured in an accident, the direct "cause" of the accident will almost *never* be something related to the plaintiff's employment. The accident may be caused by a careless driver running a red-light, or by the employee's own failure to keep his eyes on the road while changing radio stations, or by the employee falling asleep at the wheel due to having irresponsibly stayed up too late playing a computer game the night before, or by the employee having an insulin reaction due to having failed to eat lunch; none has a greater connection to the plaintiff's employment than the other. But each of these direct causes of the accident should not shield the operative fact that, in each case, the employment imposed the risk (operating a motor vehicle) that produced the traumatic injury.

Nevertheless, TOTAL urges the Court to adopt a rule that the employment-related risk must "go beyond the common risks of everyday life". As authority for the proposition, TOTAL seeks to perpetuate the WCAC's error in taking out of context the Court of Appeals' concluding passage in *Ledbetter*, discussed earlier, regarding the claim that the employer's concrete floor contributed to the injury. The WCAC's opinion quoted *Ledbetter*, in both *Frazzini* and *Hill/Auto Club*, to state:

> "'[I]t cannot be said with certainty that had the fall occurred at a different location, away from the employer's premises, the injuries would have been less serious.' It likewise cannot be said in this case. Driving, whether for personal purposes or to go to or from work, is at the heart of everyday life. It is something most people do every day."

(WCAC opinion--396a, *quoting, Hill/Auto Club of Michigan*).

The clear error is revealed in the parallel being drawn between the risk at issue in *Ledbetter* and the risk at issue in the cases at bar. The risk in *Ledbetter* was of falling down while standing on a floor - which is no risk at all *absent* the wholly personal element of a seizure disorder. The risk at issue in the cases at bar is the employer-imposed risk inherent in operating a motor vehicle. That there is such risk is undeniable, given our mandatory seatbelt laws, given our mandatory no-fault insurance scheme, and, indeed, given that our Legislature has specifically envisioned the reality of *employment-related* automobile accidents in making workers' compensation benefits primarily liable over no-fault insurance benefits. MCL 500.3109(1).

Further, while the employee in *Ledbetter* was not "standing" at the behest of his employer (or at least was not advancing any particular employer-related purpose while

merely "standing"), Frazzini and Hill *were* driving motor vehicles at the behest of their employers for an employment-related purpose. These distinctions were and entirely missed by the WCAC and TOTAL.

Quite simply, in the case of the employee in *Ledbetter* (as in *McClain*) there were no employment-related risks *at all*; there was just a potential that the employee's *personal* risk (such as a seizure disorder) might manifest itself on the employer's premises. The question to ask in this type of case, then, is whether there is any employment-related risk to go along with the personal risk of a seizure, or blackout, or fainting spell, such that the injury that results from the blackout would not have occurred, or would have been significantly less serious, had the employment-related risk been removed from the equation.

In *Ledbetter* (and *McClain*), there was no employment-related risk combining with the seizure or blackout. But when the employment places the worker on an extension ladder, or next to an industrial machine with moving gears, or behind the wheel of a motor vehicle, there *is* a significant employment-related risk, which, when coupled with the "personal risk" of a seizure or blackout, changes dramatically the potential seriousness of any blackout-related injury. Defendant fails to acknowledge this controlling point.

Of course, one does not need to be in the course of employment to be operating a motor vehicle; but neither does one need to be in the course of employment to be climbing an extension ladder, or cooking, or using any number of dangerous tools. Whether the risk of injury at work is common to everyday life, then, cannot be the test, and the Court of Appeals correctly rejected this aberrant rule created by the WCAC in these cases. If a risk of injury is undertaken in the course of employment, and it contributes to or combines with

a "personal risk" to produce an injury or such that any injury is substantially aggravated or enhanced due to the work-related risk, then there is no basis for concluding that the injury did not "arise out of" the employment.

CONCLUSION

Ledbetter set forth the applicable rule for determining compensability in matters involving personal risks in the employment situation, and the WCAC clearly engaged in erroneous legal reasoning and operated within a wrong legal framework--both in *Frazzini* and in *Hill/Auto Club*--in its misapplication of *Ledbetter* to these facts. The Court of Appeals properly reversed the WCAC in both cases, and in so doing accurately expressed and applied the "idiopathic fall" doctrine, and its proper limits.

This Court should reject the discussion in *Van Gorder* that inappropriately examines whether an "accident" arises out of the course of employment rather than whether an "injury" arises out of the course of employment. This Court should fully endorse the analysis and disposition of the Court of Appeals' opinion.

RELIEF REQUESTED

For all the reasons set forth herein, Intervening Plaintiff-Appellee, AAA OF MICHIGAN, respectfully requests this Honorable Court to AFFIRM the judgment of the Court of Appeals in this matter.

Respectfully submitted,

GARAN LUCOW MILLER, P.C.

By: _____

DANIEL S. SAYLOR (P37942)
Attorneys for Intervening Plaintiff-Appellee,
AAA OF MICHIGAN
1000 Woodbridge Place
Detroit, Michigan 48207-3192
(313) 446-5520

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